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No. 82-556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PRESS-ENTERPRISE COMPANY,

Petitioner,

v.

THE SUPERIOR COURT OF CALIFORNIA,
RIVERSIDE COUNTY,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District

BRIEF *AMICI CURIAE* OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; AMERICAN SOCIETY OF NEWSPAPER EDITORS; ASSOCIATED PRESS; ASSOCIATED PRESS MANAGING EDITORS ASSOCIATION; THE LOS ANGELES TIMES; THE MIAMI HERALD PUBLISHING CO.; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL NEWSPAPER ASSOCIATION; THE NEW YORK TIMES COMPANY; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; THE SAN FRANCISCO CHRONICLE; AND THE WASHINGTON POST.

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INTEREST OF THE AMICI CURIAE

Amici curiae and their members are publishers, broadcasters, editors, reporters and photographers working throughout the United States. *See* Appendix *infra*. If the decision below is not reversed, the membership of these *amici* will be adversely affected in their ability to report the news to the public.

SUMMARY OF ARGUMENT

Twice since 1980, this Court has ruled that the press and public have a constitutional right of access to criminal trials. *See Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. 2613, 2618 (1982).[1] This right emanates both from our tradition of criminal trials open to the public and from the vital role of public trials in ensuring the integrity of the judicial process and our system of self-government. *Id.* at 2619-20.

The decision of the trial court in this case to close a crucial part of *voir dire* in a capital case and seal the transcript of the closed proceedings permanently violates the First Amendment right of access to criminal trials. From the dawning of our jury system, selection of the citizens who would determine a defendant's guilt or innocence has been part of the trial itself and open to public scrutiny. The evolution of the jury system has been an ongoing tribute to the principle that, as de Tocqueville observed, "[t]he institution of the jury . . . invests the people . . . with the direction of society."[2]

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[1] Although there was no opinion of the Court in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), seven justices recognized a right of access to criminal trials embodied in the First Amendment and applied to the States through the Fourteenth Amendment. *Id.* at 580-81 (Burger, C.J., announcing judgment); *id.* at 584-98 (Brennan, J., concurring in judgment); *id.* at 598-601 (Stewart, J., concurring in judgment); *id.* at 601-04 (Blackmun, J., concurring in judgment).

[2] A. de Tocqueville, Democracy in America 127-28 (New Am. Libr. ed. 1956).

The trial court's decision further ignores the imposing array of structural values that undergird the right of access to criminal trials. Closure removes a fundamental safeguard on trial proceedings designed to restrain the abuse of power, check corrupt practices, and protect the rights of the accused. In addition, closure deprives the public of information about its judicial system and hampers an informed discussion of public affairs. Because jurors are supposed to be representatives of an impartial public, the public must have full confidence in the means by which they are selected. The need for such confidence is greatest when the jury determines whether death is the proper punishment for the accused. To deny the press and public access to this portion of a criminal trial serves only to diminish the reservoir of public confidence enjoyed by the judiciary over the course of the last two centuries.

Accordingly, *amici* urge this Court to hold that an order closing *voir dire* in a criminal trial cannot survive constitutional scrutiny unless, following a hearing and findings articulated in the record, the trial court determines that (1) a compelling governmental interest mandates closure; (2) less restrictive alternatives to closure will be ineffective, and (3) closure will effectively prevent the perceived harm. In the instant case, the trial court failed to make the requisite showing and its order closing *voir dire* to the press and public cannot stand.

I. THE PRESS AND PUBLIC HAVE A FIRST AMENDMENT RIGHT OF ACCESS TO *VOIR DIRE*.

A. The First Amendment Grants The Press And Public A Right Of Access To Criminal Trials.

Chief Justice Burger stated in *Richmond Newspapers, Inc.* v. *Virginia* that "[w]ithout the freedom to attend . . . [criminal] trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.' " 448 U.S. at 580 (quoting *Branzburg* v. *Hayes*, 408 U.S. 665, 681 (1972)). This constitutional commitment to

public proceedings reflects the principle that "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern," *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 839 (1978), and underscores " 'a profound judgment about the way in which law should be enforced and justice administered.' " *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 593 (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968)). Thus, the First Amendment right to attend trial proceedings springs from the "presumption of openness [that] inheres in the very nature of a criminal trial under our system of justice." *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2622.

The role of the press as surrogate for the public in the courtroom has grown along with the structure and size of our communities. Where once the entire population of a town could gather for a public trial, the press is now the citizenry's primary source of information about criminal proceedings. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 572-73; *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-92 (1975).

In the instant case, the trial court's order closing *voir dire* in a capital case impinges directly on the First Amendment right of access to criminal trials. By summarily closing the courtroom, the trial court failed to recognize that the two principles that underlie previously enunciated constitutional law apply to *voir dire* with the same force as they apply to other critical moments of a trial such as the cross-examination of witnesses or the charging of the jury: (1) *voir dire* "historically has been open to the press and general public," and (2) access to *voir dire* "plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2619-20.[3]

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[3] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 597-98 ("[R]esolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances.") (Brennan, J., concurring in judgment).

B. *Voir Dire* And Jury Selection Are Integral Parts Of The Criminal Trial And Traditionally Have Been Conducted In Open Court.

This Court's decision in *Richmond* reflected the judgment of history. Marshalling contemporaneous accounts of English common law and American colonial practice, the Court concluded that "throughout its evolution, the trial has been open to all who care[d] to observe." 448 U.S. at 564 (Burger, C.J., announcing judgment). Historical materials, dating from the adoption of the First Amendment and earlier, made clear that public access "has long been recognized as an indispensable attribute of an Anglo-American trial." *Id.* at 569. The First Amendment right of access to judicial proceedings draws its essence from this common law heritage, not only because "the Constitution carries the gloss of history," but, more particularly, because the "tradition of accessibility implies the favorable judgment of experience." *Id.* at 589 (Brennan, J., concurring in judgment).[4]

Throughout Anglo-American history, the assembling, examination, and selection of jurors have been consistently conducted in public as an integral part of the trial of guilt or innocence. The roots of these traditions date to the early antecedents of the common law. Before the Norman Conquest, Anglo-Saxon trials were "open-air meetings of the freemen who were bound to attend them." F. Pollock, The Expansion of the Common Law 140 (1904). In pre-Norman times, criminal trial was by compurgation or by ordeal; the accused had to

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[4] *See* Globe Newspaper Co. v. Superior Court, 102 S. Ct. at 2623 ("*Richmond Newspapers* rests upon our long history of open criminal trials . . .") (O'Connor, J., concurring in judgment); *id.* at 2624 (emphasizing "historical tradition of open criminal trials") (Burger, C.J., dissenting); Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 601 ("It is gratifying to see the Court now looking to and relying upon legal history in determining the fundamental public character of the criminal trial.") (Blackmun, J., concurring in judgment); Gannett Co. v. DePasquale, 443 U.S. 368, 389-91 (1979) (citing 19th-century English authority); *id.* at 418-27 (Blackmun, J., dissenting).

summon compurgators or "oath helpers" to swear their belief in his oath denying the charges against him. F. Maitland, The Constitutional History of England 116-19 (1908). These proceedings were conducted before the community at large, and have been described as "an ill-managed public meeting." F. Pollock, *supra*, at 30.

The Anglo-Saxon tradition of open proceedings continued after the C[illegible]uest, with the institution of trial by jurors called by the sheriff or the court, instead of compurgators or "oath helpers" called by the accused. Norman kings introduced in England the Frankish practice of summoning sworn bodies of neighbors to decide disputed questions of fact. 1 W. Holdsworth, A History of English Law 312 (3d ed. 1922); F. Maitland, *supra*, at 121-22. Early criminal juries, drawn from the neighborhood of the alleged offense, were as much witnesses as judges of the facts. Often the jurymen were already acquainted with the defendant and the facts; in broader terms, jurors were witnesses because they brought to the trial the sense of the community from which they were drawn. 1 W. Holdsworth, *supra*, at 317.

Thus, the defendant was tried "per pais" or "by the country," as represented by the jurymen. M. Hale, The History of the Common Law of England 336 (1713) (Runnington ed. 1820). Indeed, "it is in this effort to get the representative voice of the community that we find the key to the real origin of the petty jury." Wells, *The Origin of the Petty Jury*, 27 L. Q. Rev. 347, 355 (1911). The "town meeting" form of trial continued as the English common law gained character. By the time of Henry III (1216-72), juries themselves "became embarrassingly large and unwieldy." *Id.* at 356. Reports appear in the thirteenth century of trials involving "at least eighty-four jurors." *Id.* at 355 & n.5 (citing cases reported in Assize Rolls from Henry III's reign). As Chief Justice Burger's study of fourteenth-century materials demonstrated in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 566, attend-

ance of the community was encouraged and the entire proceeding was a decidedly public event.[5]

The transformation of the jury from a body of witnesses summoned to swear to already known facts to an impartial trier of facts is due in large part to the development of the law relating to challenges. 1 W. Holdsworth, *supra*, at 332, 336.[6] Eligibility requirements for jury service date from Norman times, and through the fourteenth and fifteenth centuries, rules flourished permitting objections to proposed jurors.[7]

Contemporaneous accounts of early jury selection procedures reveal that challenges and exceptions were routinely determined in open court, as the first phase of the trial on guilt or innocence.[8] In 1583, Sir Thomas Smith described the defini-

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[5] *See* E. Jenks, The Book of English Law 25 (6th ed. 1967) (" 'court day' has, from time immemorial, been one of the great rivals of the fair or pageant in the attracting of crowds"); 2 J. Bishop, New Criminal Procedure § 957 (2d ed. 1913) ("By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted.").

[6] The right to challenge jurors at the outset of the trial is probably as ancient as the institution of the jury itself. Bracton and Britton, writing in the thirteenth century, both mention it. *See* 1 W. Holdsworth, *supra*, at 324:

> As early as the days of Bracton it was recognized that upon an enquiry as to the guilt or innocence of the prisoner, the prisoner ought to be allowed to object to members of the jury on the ground that they were his personal enemies; and Britton allowed an accused person to object to the presence on the trial jury of persons who had presented him for trial. In 1302 an accused Knight objected to the jury . . . because . . ., not being Knights, they were not his peers.

[7] *Id.* at 324-25.

[8] In 1352, a statute was enacted to permit challenges to petty jurors on the ground of their participation as "indictors" on the presenting jury. 25 Edw. 3, C. 3, § 5; *see* T. Plunkett, A Concise History of Common Law 109 (1929). From earliest times, objections were allowed on grounds of personal hostility, or that a proposed juror was not a peer of the accused. 1 W. Holdsworth, *supra*, at 324-25. Sir

tive "proceedinges of causes criminall." T. Smith, De Republica Anglorum 85 (1583) (Alston ed. 1906). Smith places the sixteenth-century trial "[i]n the towne house, or in some open or common place." *Id.* at 96. As the trial begins, the judges and the accused are present, but the jurors have not yet been called. "At the end of [a] table [before the judges], there is a barre made with a space for thenquestes and xij men to come in when they are called. . . ." *Id.* The crier commands silence, and one of the judges "telleth the cause of their comming, and giveth a good lesson to the people" amassed in the "open or common place" of the proceedings. *Id.* at 96-97. The clerk then reads the indictment; if the accused pleads not guilty, he must be tried "by God and the Countrie," as represented by the jurymen. *Id.* at 98. One by one, the jurors are thereupon called forward to the "barre," and, at this stage, the defendant is allowed to challenge each juror, individually, as the juror is called:

> Then calleth he [the clerk] in the first Juror. B.C. come to the booke, and so giveth him an othe to go uprightlie betwixt the Prince and the prisoner, &c. If the prisoner objecteth nothing against him, he calleth an other, and so an other, till there be xii. or above. . . .

Id.

Occasionally, so many exceptions are taken, and so many prospective jurors rejected, that the entire "day is lost," *id.* at 79; objections for cause are many, and thirty-five peremptory challenges are allowed.[9] Smith, moreover, is clear that the entire trial proceeds

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John Fortescue, writing in the fifteenth century, stated that "[o]f these exceptions [to jurors] there are so many kinds and varieties that it is impossible to explain them in this short sketch." J. Fortescue, De Laudibus Legum Anglie 57-59 (1468-71) (Chrimes ed. 1942). Lord Coke in 1628 outlined numerous and detailed challenges. 1 E. Coke, Commentary Upon Littleton 155b-58b (1628) (Butler ed. 1853).

[9] *See* 1 E. Coke, *supra*, at 156b-58b.

> not after the fashion of the civill law but openly, that not only the xii, but the Judges, the parties and as many as be present may heare.

Id.

Voir dire of petty jurors also appears in accounts of seventeenth-century trials. In *Peter Cook's Trial*, 4 Har. St. Tr. 738 (O.B. 1696), for instance, the accused himself—*in open court*—attempted to pose questions directly to jurors in order to sustain challenges. The court ruled:

> You may aſk upon a Voyer Dire, whether he [the juror] have any Intereſt in the Cauſe; nor ſhall we deny you Liberty to aſk whether he be fitly qualified, according to Law by having a Freehold of ſufficent Value.

Id. at 748.[10]

This Court has previously recounted the adoption in the American colonies of the English tradition of open trials. *E.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 567-69 (Burger, C.J., announcing judgment); *In re Oliver*, 333 U.S. 257, 271-72 (1948). *Voir dire* assumed broader significance in American trials than it had in England, yet there is no indication that the Americans revised the British practice of questioning and selecting jurors in open court.[11] In fact, American

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[10] *See* Francis Francia's Trial, 6 Har. St. Tr. 58-60 (O.B. 1716). Indeed, in *Harriſon's Trial*, 2 Har. St. Tr. 313 (O.B. 1660), the reporter remarks that the defendants' persistence in challenging jurors provoked laughter among the spectators in the courtroom: "Here the People ſeemed to laugh," he writes, upon the defendants' tenth peremptory challenge. *Id.* at 313.

[11] Under common law, as now, *voir dire* could be employed as a means for the defendant to obtain information in open court about jurors. Thus, in *Titus Oates' Trial*, 4 Har. St. Tr. 1 (K.B. 1685), the accused inquired of a prospective juror: "Are you not a Goldſmith in Fleetſtreet . . .?" To the juror's affirmative reply, the accused stated, "Very well, sir, I do not except against you, only I deſir'd to know whether it were you or not?" A peremptory challenge could have been exercised.

courts soon enlarged the function of *voir dire*. In 1807, Chief Justice Marshall, sitting as a trial judge in Aaron Burr's trial for treason, ruled that jurors could be asked on *voir dire* whether they had formed an opinion on Burr's guilt. *United States* v. *Burr*, 25 F. Cas. 49 (C.C.D.Va. 1807) (No. 14,692g). This holding was a clear rejection of the English rule prohibiting examination of a juror about any preconceived opinion as to guilt, or the juror's "dishonor or credit."[12] In the *Burr* trial, *voir dire* was undertaken in open court, in accordance with the English tradition. *Id.* at 76-87.

Chief Justice Marshall's ruling in the *Burr* trial was highly influential, and nearly all states soon permitted examination of jurors themselves in an effort to bring forth prejudice or bias, even if the questions concerned a juror's preconceived opinion, "dishonor or credit."[13] Expanded *voir dire* of jurors became a uniquely American characteristic of trial proceedings.[14]

Although the permissible scope of *voir dire* in American criminal trials has been expanded, jurors are protected because *voir dire* questioning has largely been entrusted to the sound discretion of trial judges. Trial courts, of course, have power to prevent abusive questioning and to restrain counsel

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[12] *Voir dire* of jurors was more limited under English common law than it is in the United States today. 3 W. Blackstone, Commentaries on the Laws of England 364 (10th ed. 1787). Indeed, at common law, a juror could not be asked whether he had already stated an opinion as to the defendant's guilt or innocence, since answering could require the juror to commit the slander of stating *in public*, prior to conviction, that the defendant had committed crime. Peter Cook's Trial, 4 Har. St. Tr. at 750. The very existence of restraints on asking jurors themselves questions "touch[ing] dishonor or credit," 1 E. Coke, *supra*, at 158b, bespeaks the measure of public exposure which *voir dire* has always entailed.

[13] J. Van Dyke, Jury Selection Procedures 143 (1977).

[14] To this day in England and Canada, jurors may not be questioned about personal bias. *Id.*

from harassing or embarrassing jurors. Indeed, in the federal courts, as in thirteen states, the trial judge has nearly unfettered control of the questioning of prospective jurors: attorneys may submit proposed questions to the judge, which the judge, in his discretion, may or may not pose to potential jurors; and the judge need not allow attorneys directly to examine the veniremen at all. J. Van Dyke, Jury Selection Procedures 282-84 (1977).[15]

American courts consistently have regarded *voir dire* and selection of jurors as the crucial first phase of the trial at which guilt or innocence is determined, a proceeding historically open to the public. In his authoritative opinion for the Ninth Circuit in *United States* v. *Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982), Chief Judge Browning surveyed the American authorities and concluded that "[t]he *voir dire* is generally considered 'part of the trial.' "[16]

From this tradition—unbroken throughout centuries of Anglo-Saxon and American practice—it is clear that jury selection has always been deemed part of the actual trial and, as such, has been conducted in public. Accordingly, this Court should declare that the "presumption of openness [which] inheres in the very nature of a criminal trial under our system of justice," *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 573 (Burger, C.J., announcing judgment), attaches to *voir dire* examination of jurors as well.

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[15] *Amici* have located no rule of court or statute, in any state, permitting closure of the courtroom during *voir dire*. To be sure, judges occasionally permit jurors to answer particular *voir dire* questions outside the hearing of other jurors—at side bar, for instance. *See, e.g.*, United States v. Ridley, 412 F.2d 1126 (D.C. Cir. 1969); Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980); North Carolina v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978); Wientjes v. Kentucky, 263 S.W 2d 721 (Ky. 1953).

[16] *Accord*, Commercial Printing Co. v. Lee, 262 Ark. 87, 89-90, 553 S.W.2d 270, 271 (1977) (*voir dire* "part of the trial itself"); *In re* United States *ex rel.* Pulitzer Publishing Co., 635 F.2d 676 (8th Cir. 1980); Great Falls v. District Ct., 608 P.2d 116 (Mont. 1980).

C. Access To *Voir Dire* By The Press And Public Enhances The Integrity Of The Judicial Process And Our System Of Self-Government.

The value of the open criminal trial, including *voir dire*, to the judicial process and to our system of self-government "is recognized in both logic and experience." *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2620. Public scrutiny of the process through which a jury is selected, either through actual attendance in the courtroom or through press reports of the proceedings, enhances the effective functioning of the judicial system and public confidence in its operation. Even a cursory review of the coverage of criminal trials by the American press reveals that news reports about *voir dire* facilitate the informed debate that fosters "our republican system of self-government."[17]

1. Open *voir dire* provides a fundamental safeguard on the fair conduct of judicial proceedings.

"[P]ublic access to the criminal trial fosters an appearance of fairness . . . and serve[s] as a check upon the judicial process." *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2620.[18] A

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[17] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 587-88 (Brennan, J., concurring in judgment):

> [t]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government. . . . Implicit in this structural role is not only the principle that debate on public issues should be uninhibited, robust and wide-open . . . but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication. [footnote omitted].

[18] *See* United States v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982):

> There can be no doubt of the importance of public scrutiny of the jury selection process to the effective functioning of the government as well as the judicial system itself. The meticulous care

nation founded on the principle of ordered liberty must have a system of justice "that demonstrates the fairness of the law to [its] citizens," *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 594 (Brennan, J., concurring in judgment), because those citizens have "a definite and concrete interest in seeing that justice is swiftly and fairly administered," *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 383 (1979). The need to demonstrate the fairness of judicial proceedings applies with equal force to the examination of prospective jurors as to the examination of witnesses later in the trial.[19]

The accused in a criminal case enjoys the right to a jury trial, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), a "fair trial by a panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). Conducting criminal trials in public furthers "the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 593 (Brennan, J., concurring in judgment); *see Estes* v.

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devoted to securing a fair and impartial jury exemplifies the search for even-handed justice characteristic of our system of criminal justice. Public access to the process will heighten public respect for that system. At the same time public scrutiny will encourage those who participate in the jury selection process to enhance the quality of the process and safeguard its integrity.

[19] *See* Ryan & Neeson, *Voir Dire: A Trial Technique in Transition*, 4 Am. J. Tr. Advoc. 523, 526 (1981) ("[i]t is common knowledge that the process of jury selection is a critical component in the successful presentation of a case"); Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, 43 Law & Contemp. Probs. 116, 116 (1980) ("[j]ury selection is the most important part of any criminal trial"); Van Dyke, *Voir Dire: How Should It Be Conducted To Ensure That Our Juries Are Representative and Impartial?*, 3 Hastings Const. L.Q. 65 (1976) (many trial lawyers argue that cases are won or lost in *voir dire*); Note, *Restricting Inquiry Into Racial Attitudes*, 19 Am. Crim. L. Rev. 719, 721 (1982) ("[t]rial by an impartial jury is among the most fundamental rights guaranteed a criminal defendant").

Texas, 381 U.S. 532, 538-39 (1965). Public questioning of potential jurors during *voir dire* encourages frank responses from veniremen and ensures swift exposure of abuse of defendants' rights.[20]

In this regard, public access to *voir dire* safeguards the integrity of the jury selection process and the criminal trial itself. *See Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2620; *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 596-97 (Brennan, J., concurring in judgment). Public *voir dire*, reported to the community by the press, makes it possible for those with information to come forward and rebut false information provided by prospective jurors. *See id.* at 569-70 (Burger, C.J., announcing judgment); *id.* at 596-97 (Brennan, J., concurring in judgment). Such publicity can "induce un-

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[20] *See* J. Van Dyke, *supra* note 13, at 154-55 (challenges have been employed to exclude members of race or class from jury); Mullin, *The Jury System in Death Penalty Cases: A Symbolic Gesture*, 43 Law & Contemp. Probs. 137, 146 (1980) ("[d]ue to the highly prejudicial atmosphere in execution cases, probative and sifting *voir dire* is a basic requirement [in insuring] fair and impartial jurors will be selected"); Comment, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 Hastings L.J. 959, 961 (1982).

This Court has recognized that the composition of the jury in a capital case is crucial to the fairness of the trial and, therefore, to the constitutional validity of the death sentence itself. *See* Enmund v. Florida, 102 S. Ct. 3368, 3375-76 (1982); *id.* at 3386 (O'Connor, J., dissenting); Coker v. Georgia, 433 U.S. 584, 596 (1977) (White, J., announcing judgment); Gregg v. Georgia, 428 U.S. 153, 183 (1976) (Stewart, J., announcing judgment); Woodson v. North Carolina, 428 U.S. 280, 293 (1976) (Stewart, J., announcing judgment); Furman v. Georgia, 408 U.S. 238, 299-300 (1972) (Brennan, J., concurring); *id.* at 386 n.11 (Burger, C.J., dissenting); *id.* at 439-40 (Powell, J., dissenting).

known witnesses to come forward with relevant testimony." *Gannett Co.* v. *DePasquale*, 443 U.S. at 383.[21]

Contemporary news reports are illustrative of the role of press and public access to *voir dire* in ensuring the fairness and integrity of the criminal trial. In 1972, for example, a reporter for the *St. Louis Post-Dispatch* observed the *voir dire* of thirty-one criminal trials involving black defendants and found that, of the seventy-seven blacks qualified to serve and not challenged for cause, seventy-four percent were challenged peremptorily by the prosecution.[22] As a result, the *Post-Dispatch* found that, while blacks on the venire reflected their proportionate number in the county's population, prosecutors had systematically excluded black jurors from cases involving

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[21] Public knowledge of the responses of prospective jurors can lead to the discovery of false or incomplete information elicited during *voir dire*. *See e.g.*, *Antonelli, Yeldell Ask Retrial; Father of Juror Fired by Parking Lot Firm*, Wash. Post, Nov. 15, 1978, at C 1, col. 5 (reporting mistrial after completion of case based on juror's failure to state during *voir dire* that her father had once been fired by defendant's firm); *Study Raises Questions About Mitchell-Stans Juror*, Wash. Post, Feb. 5, 1976 (report on juror's friendship, never disclosed during *voir dire*, with member of prosecution staff).

[22] St. Louis Post-Dispatch, Dec. 24, 1972, at 1, col. 4; *see Blacks Cry Foul Over Jury Lists*, Philadelphia Bull., July 14, 1980, at 13, col. 5 ("Anthony Pannel, Ronald Jones and other black defendants know what it's like to face a nearly white or all-white jury in Delaware County Court" because of jurisdiction's jury selection process); *Defense Attorney Challenges Hillsborough Jury Selection*, Tampa Tribune, Apr. 4, 1980, at 1A, col. 5 (*voir dire* has resulted in system where white collar, middle income defendant is denied fair trial); *Trial By Peers? Few Young Adults, Blacks, Women Serve on Juries, Psychologist Says*, Greensboro Daily News, July 15, 1979, at B 1, col. 1 ("A Raleigh psychologist who specializes in jury selection . . . contends there is a conscious effort to exclude not only young people from jury lists but also blacks and women"); *Juries Are Short on Blacks*, Akron (Ohio) Beacon J., Dec. 26, 1976, at A 1, col. 4 (absence of blacks on juries in Summit County, Ohio.).

black defendants.[23] Moreover, the newspaper observed that local prosecutors altered their systematic striking of blacks when they learned its reporter's purpose in the courtroom.[24] Thus, public scrutiny of *voir dire* can enhance the quality of the process through which the arbiters of guilt or innocence are chosen.[25]

2. Open *voir dire*, especially in capital cases, facilitates the free discussion of public affairs.

Underlying the constitutional right of access to criminal trials is the First Amendment's purpose of facilitating the free discussion of governmental affairs. *Globe Newspaper Co.* v.

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[23] *Cf.* Mullin, *supra* note 20, at 148 (capital defendants are often faced with jury that does not represent cross-section of community and is composed only of jurors who believe in death penalty due to *voir dire* practices of prosecutors); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 662, 673-81 (1974) (systematic exclusion by prosecutors of blacks from juries hearing cases of black defendants, as detailed in newspaper articles, denies defendants their constitutional right to trial by jury representing fair cross-section of community); Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L. Rev. 1, 5 (1982) (systematic exclusion by prosecutors of jurors opposed to death penalty violates defendant's due process rights).

[24] St. Louis Post-Dispatch, May 13, 1973, at 6A, col. 1; Comment, *supra* note 23, at 676.

[25] In 1981, the *Baltimore Sun* reported the evolution of jurors' views on imposing the death penalty over the course of a trial. The *Sun* reported the jurors' responses during *voir dire*, described how the evidence affected them and explained how they ultimately reached their decision. According to the *Sun*, the defendant's acquittal was due in large part to the fairness of the process. *Horton Jurors Now Say Trial Changed Them*, Baltimore Sun, Jan. 6, 1981, at C 1, col. 5; *see Jurors' Views on Morality Key to Shooting Trial in Loudon*, Wash. Post, Dec. 17, 1980, at B 1, col. 1 (detailing questions asked to ensure fairness of jurors).

Superior Court, 102 S. Ct. at 2619; *Mills* v. *Alabama*, 384 U.S. at 218 (1966).[26] Public access to *voir dire* has allowed the press to provide firsthand accounts of the process through which representatives of the community are selected for service,[27] the strategies of counsel in posing questions during *voir dire*,[28] interviews with veniremen after they have been questioned,[29] and the impressions of staff members called for jury duty.[30] Only by access to *voir dire* can the press perform this vital function.

As lawyers, social scientists and psychologists promote the notion that expensive survey techniques can be employed to select juries likely to reach preordained verdicts, public scrutiny of the jury selection process has become increasingly significant.[31] Indeed, advanced jury selection techniques are

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[26] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978).

[27] *See, e.g., We the Jury Find the . . .*, Time, Sept. 28, 1981, at 44-56; *A Jury of Whose Peers?*, Christian Sci. Monitor, Aug. 22, 1977, at 18, col. 1.

[28] *See, e.g., How do trial lawyers pick those 12 peers?*, Akron (Ohio) Beacon J., Feb. 22, 1976, G 1, col. 1; *The Court's Hunt for the Perfect Jury; Each Lawyer Seeking a Slight Edge at Trial*, Chicago Tribune, Feb. 13, 1980, at 1, col. 1; *Hung Up on Jury Selection; In Court, Plumbing the Mysteries of the Human Face*, Wash. Post, Aug. 4, 1978, at C 1, col. 5; *He Likes a Bleached Blonde on the Jury for That Kind of Case*, Wash. Star, June 3, 1975, at B 1, col. 1.

[29] *See, e.g.*, Raleigh (N.C.) News & Observer, Mar. 9, 1980, § 4 at 1, col. 1.

[30] *See, e.g., The Trials and Rewards of Jury Duty . . . And Ways to Improve It*, Des Moines Tribune, Nov. 16, 1977.

[31] *See* J. Van Dyke, *supra* note 13, at 188 (expensive jury selection techniques "may indeed help obtain a jury that acquits a defendant, but possibly at the cost of diminishing respect for the judicial system. Panels that seem to have been manipulated by one side or the other (or both) will not fulfill their purpose of carrying legitimacy to the community."); Ryan & Neeson, *supra* note 19, at 532-34 (key to

now employed in all manner of cases, from complex antitrust litigation to capital cases such as the one at issue here.[22] Access to *voir dire* is crucial to an informed public debate about this revolutionary theory of judicial administration.

Indeed, no facet of the judicial process is subject to more intense national debate than the decision to impose the penalty of death. Our government performs no more solemn function than taking the life of a human being as punishment for his crimes. It has been argued that the selection of jurors in a death penalty case is the one factor most determinative of the

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selecting jury is gathering empirical information through community-wide investigation and survey to find which persons will most likely decide in desired way); Fahringer, *supra* note 19, at 121 (value in gathering information about jurors through "the science of survey research" is that while jurors may not give candid answers, "they cannot conceal their pedigree and background"); N.Y. Times, Nov. 28, 1982, Magazine, at 71 ("a controversial new use of psychosocial research views jurors not as free moral agents, but as organisms whose mental and emotional processes are essentially predictable"); L.A. Times, Sept. 27, 1974, § 1A, at 2, col. 1 (describing perils of new techniques used to select juries); Wall St. J., Aug. 12, 1974, at 1, col. 1 (social scientists' role in selecting juries may produce biased panels); Etzioni, *Science: Threatening the Jury Trial*, Wash. Post, May 26, 1974, at C 3, col. 1 ("the jury's impartiality is threatened because defendants' attorneys have discovered that by using social science techniques, they can manipulate the composition of juries to significantly increase the likelihood that their clients will be acquitted").

[22] *See* Nietzel & Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 L. & Hum. Behav. 1 (1982) ("scientific jury selection has now trickled down to defendants involved in less celebrated cases or what one practitioner has termed the 'typical criminal case' "); National Jury Project, Jurywork: Systematic Techniques (1979).

Social science techniques of jury selection were first popularized in a series of highly publicized trials, including those of Joan Little, the Harrisburg Seven, Angela Davis, John Mitchell and Maurice Stans. *See* N.Y. Times, Nov. 28, 1982, Magazine, at 71; Wall St.J., Aug 12, 1974, at 1, col. 1.

sentence ultimately imposed.[33] Prohibiting access to *voir dire* in a capital case, thereby foreclosing public scrutiny of the criteria used to select the persons who must determine the defendant's fate, "limit[s] the stock of information from which members of the public may draw." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 576 (Burger, C.J., announcing judgment) (quoting *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978)). Such withholding of information about perhaps the most crucial portion of a capital case restricts the public's ability to determine whether the system as a whole, or the trial at issue, is fair and just.

In this regard, open *voir dire* in capital cases has enabled the press to inform the public about *voir dire* and jury selection in trials of public significance. The *San Francisco Chronicle*, for example, provided extensive coverage of *voir dire* in the so-called "Zebra" murder trial[34] and the trial of a prominent public official for the killings of Mayor George Moscone and Supervisor Harvey Milk.[35] The *Chronicle* explained the methods by which jurors were selected, the questions posed in *voir dire*, and the prospective jurors' views on capital punishment.[36]

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[33] *See* J. Van Dyke, *supra* note 13, at 139; Winick, *supra* note 23, at 79; Nietzel & Dillehay, *supra* note 32, at 10-11. For example, coverage of the jury selection process in the trial of four police officers charged with killing a black man led the *Miami Herald* to report, in the wake of rioting following an acquittal by an all-white, all-male jury, that a "defense attorney said the prosecution made its biggest mistake in jury selection." *Hindsight: Advice, Criticism Plentiful*, Miami Herald, May 20, 1980, at 18 A, col. 1.

[34] *See* S.F. Chron., Mar. 12-Apr. 3, 1975.

[35] *See* S.F. Chron., Apr. 25-28, 1979.

[36] *See generally This Jury Was Tough to Gather*, Tallahassee (Fla.) Democrat, Jan. 20, 1980, at 1 B, col. 6 (describing juror qualification in longest criminal jury selection process in Florida history); *11 Jurors Impaneled in Epperly Murder Trial*, Roanoke (Va.) Times & World-News, Dec. 9, 1980, at A 1, col. 3 (reporting questions, answers and qualifications used to select jury).

Perhaps the most significant function served by open criminal trials, including *voir dire*, is the creation of public confidence in the criminal justice system. Closed criminal trials "breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 595 (Brennan, J., concurring in judgment).[37] Confidence in the judicial process can be endangered if the public is denied access to that portion of the trial during which the qualifications of the triers of fact are established.[38]

This Court need look no further than the recent trial of John W. Hinckley, Jr. for an unfortunate example of how closed *voir dire* can contribute to diminished public confidence in the administration of justice.[39] The jury's verdict, finding the defendant not guilty by reason of insanity, produced considerable public controversy, which was heightened when transcripts of *voir dire*, released to the press and public after the trial, revealed that several jurors had close relatives once confined to mental hospitals.[40] Irrespective of whether this fact had any *actual* effect on the integrity of the trial, the resulting *percep-*

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[37] *Accord*, Nebraska Press Ass'n v. Stuart, 427 U.S. at 587; Cox Broadcasting Corp. v. Cohn, 420 U.S. at 495; *In re* Winship, 397 U.S. 358, 364 (1970).

[38] *See* J. Van Dyke, *supra* note 13, at xii-xiv ("If the jury's decision is not accepted as impartial, respect for the whole system breaks down . . . . The jury's power rests in the capacity of individuals with diverse viewpoints to reach a common decision that can be accepted as the community's verdict and will carry weight with a diverse community."); Mullin, *supra* note 20, at 144 (impartial jury is key to unbiased decision in emotional case).

[39] *See, e.g.*, N.Y. Times, Apr. 28, 1982, at A1, col. 1; *id.* at A22, col. 1; *id.* Apr. 29, 1982, at A 28, col. 1; *id.* Apr. 30, 1982, at A 23, col. 3; *id.* May 1, 1982, at 11, col. 4.

[40] *See* Wash. Post, June 4, 1982, at C 1, col. 2 (transcripts of *voir dire*, released after sentencing, reveal information not previously published).

tion of injustice may have been avoided had full public scrutiny of *voir dire* been guaranteed at the outset.

The Hinckley trial demonstrates that closure of *voir dire* in a criminal case to the press and public reduces the traditionally "therapeutic value" of such trials. As Chief Justice Burger wrote in *Richmond*:

> The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in any covert manner . . . . A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.

448 U.S. at 571 (Burger, C. J., announcing judgment).

II. *VOIR DIRE* CANNOT BE CLOSED TO THE PRESS AND PUBLIC WITHOUT FINDINGS, ARTICULATED IN THE RECORD, THAT:

A. ABSENT CLOSURE, THERE IS A SUBSTANTIAL PROBABILITY OF IRREPARABLE HARM TO A COMPELLING INTEREST;

B. NO LESS RESTRICTIVE ALTERNATIVES TO CLOSURE ARE AVAILABLE; AND

C. CLOSURE WILL EFFECTIVELY PROTECT AGAINST THE PERCEIVED HARM.

In *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2620, this Court held that trial proceedings cannot be closed to the press and public unless closure "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Because closure jeopardizes First Amendment rights, the Ninth Circuit applied the teachings of *Globe* to closure of *voir dire* in *United States* v. *Brooklier*, 685 F.2d 1162 (9th Cir. 1982). Under the test articulated in *Brooklier*, before ordering closure of any portion of a criminal trial, including *voir dire*, a court must make findings, articulated in the record, that (A) there is a substantial probability that a

compelling interest will suffer irreparable harm absent closure; (B) no adequate alternatives to closure are available; and (C) closure will effectively protect against the perceived harm. *Id.* at 1167; *see Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2620. In the instant case, the trial court failed to articulate any compelling interest that necessitated closure, failed to consider less restrictive alternatives, and failed to recognize that closure was wholly ineffective in protecting those interests it purported to find.

A. The Trial Court Made No Finding That, Absent Closure, There Was A Substantial Probability Of Irreparable Harm To A Compelling Interest.

Before ordering that any portion of a criminal trial, including *voir dire*, be closed to the press and public, the trial judge must determine that there is a substantial probability that open proceedings will result in irreparable harm to a compelling interest. *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2620; *United States* v. *Brooklier*, 685 F.2d at 1167. Such a determination must be premised on specific findings, articulated in the record. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 581 (Burger, C. J., announcing judgment); *Gannett Co.* v. *DePasquale*, 443 U.S. at 446 (Blackmun, J., dissenting); *United States* v. *Brooklier*, 685 F.2d at 1168.

In this case, the trial court failed to identify any interest so compelling as to overcome the First Amendment rights at stake. When the court orally ordered that the courtroom be closed to the press and public on October 19, 1981, it premised the need for closure solely on the California Supreme Court's decision in *Hovey* v. *Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). In *Hovey*, the California Supreme Court sought to ensure an impartial jury in capital cases by minimizing the effect of the *voir dire* process on the attitudes of potential jurors. 28 Cal. 3d at 79-80, 616 P.2d at 1353-54, 168 Cal. Rptr. at 180-81. To this end, the court held that a defendant in a capital case was entitled "to have that portion of the *voir dire* of each prospective juror, which deals

with issues other than those traditionally inquired into at any criminal trial, conducted outside the presence of the other prospective jurors." 28 Cal. 3d at 82, 616 P.2d at 1355, 168 Cal. Rptr. at 182.[41]

Hovey, however, explicitly holds that *no* compelling interest in preserving the impartiality of the jury is served by closing *voir dire* to the press and public. Chief Justice Bird, writing for the state supreme court, stated:

> This rule will not in any way affect the open nature of a trial. Although trial counsel or the court may pose general questions to the panel, the venirepersons should not respond to any questions beyond those routinely asked in any criminal trial until they are outside the presence of their fellow venirepersons.

28 Cal. 3d at 80-81, 616 P.2d at 1354, 168 Cal. Rptr. at 181. *Hovey* does not hold that the press and public should be excluded from *voir dire*, only that the statements of any potential juror during a portion of *voir dire* in capital cases be made out of the presence of other potential jurors. Indeed, closure of *voir dire* to the press and public holds little or no relationship to the interest articulated in *Hovey*—the prejudicial effect that jurors may have upon *each other*. *Hovey*, therefore, does not provide a compelling interest to support closure.

Nor can the after-the-fact concern for juror "privacy" articulated by the trial court in its February 23, 1982 order constitute a compelling interest. *United States* v. *Brooklier*, 685 F.2d at 1172-73. The trial court asserted that "some of the jurors had some special experiences in sensitive areas that do not appear

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[41] In *Hovey*, the California Supreme Court explained that there is *no* state interest in questioning jurors individually on topics unrelated to imposition of the death penalty. The court asserted that individual questioning was not called for with respect to such subjects as the race of the trial participants, use of drugs or alcohol, or the effects of sexual activity. Hovey v. Superior Court, 28 Cal. 3d at 81 n.137, 616 P.2d at 1354 n.137, 168 Cal. Rptr. at 181-82 n.137.

to be appropriate for public discussion." Such concerns may well exist, but they can hardly rise to the level of justifying secret proceedings or records. This Court has held that the "public discussion" of information revealed in judicial proceedings, even if "sensitive" or "embarrassing," is protected by the First Amendment and outweighs any competing interest in "privacy." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 491-96. Indeed, the First Amendment grants the press the right to exercise "editorial control and judgment" and determine whether to disseminate such information to the citizenry. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974); *see Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 124 (1973).

Moreover, neither rationale asserted by the trial court is supported by specific findings, set forth in the record, that open proceedings posed a substantial probability of irreparable harm. Conclusory statements arbitrarily declaring that closure is necessary are not sufficient. "Since the purpose of the findings is to enable the appellate court to determine whether the closure order was properly entered, the findings must be sufficiently specific to show that the three substantive prerequisites to closure have been satisfied." *United States* v. *Brooklier*, 685 F.2d at 1168-69. Indeed, the court's failure to articulate any findings in support of closure, coupled with its reliance on *Hovey* as requiring closure, indicates the trial court's view that at least a portion of *voir dire* must be closed to the public whenever the death penalty may be imposed. Such a mandatory ban on public access is clearly impermissible because "the circumstances of the particular case may affect the significance of the interest" involved. *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2621.

B . The Trial Court Failed To Consider Less Restrictive Alternatives.

In order to close any portion of a criminal trial, including *voir dire*, a trial court must consider and reject alternatives to closure that are less restrictive of the exercise of First Amend-

ment rights. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 581-82 (Burger, C. J., announcing judgment); *Nebraska Press Association* v. *Stuart*, 427 U.S. at 563-65; *United States* v. *Brooklier*, 685 F.2d at 1169. There is nothing in the record in the instant case to indicate that the trial court considered *any* alternative other than closure of *voir dire*.[42] Yet less restrictive alternatives were available.[43] *Hovey* itself makes clear that any threat to the impartiality of the jury can be avoided simply by questioning potential jurors one at a time in open court, out of the presence of the remaining veniremen. Thus, if the trial court did, in fact, base its closure order on *Hovey*, the least restrictive method of vindicating the interest in jury impartiality articulated in that case is to exclude potential jurors from portions of *voir dire*, *not* to close the courtroom to the press and public. Similarly, the trial court failed to explore less restrictive alternatives that would protect its after-the-fact concern for juror privacy. For example, the court could well have screened counsels' questions in advance,

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[42] The trial court's refusal to release the transcript of *voir dire*, even after conclusion of the trial and sentencing of the defendant, is further evidence that the court simply ignored its constitutional duty to consider less restrictive alternatives. *See* Globe Newspaper Co. v. Superior Court, 102 S. Ct. at 2620-23; United States v. Brooklier, 685 F.2d at 1172. This Court has held that even when a proceeding is properly closed, the transcript must be released as soon as the danger of prejudice has passed. Gannett Co. v. DePasquale, 443 U.S. at 393. Indeed, the trial court's failure to release the transcript is a continuing controversy that ensures that the instant case is not moot. In the last analysis, however, "the availability of a trial transcript is no substitute for a public presence at the trial itself." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 597 n.22 (Brennan, J., concurring in judgment).

[43] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. at 562-65; Sheppard v. Maxwell, 384 U.S. at 358-62; *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 87 F.R.D. 519, 530-35 (1980); Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 Harv. L. Rev. 1899, 1916 (1978).

thereby preventing irrelevant "personal" inquiries from being put to potential jurors in the first place.[44] Even in those circumstances in which such inquiries may be necessary, courts have identified a number of less restrictive alternatives to closure that adequately protect the asserted privacy interests. *See, e.g., United States* v. *Layton*, 519 F. Supp. 959 (N.D. Cal. 1981).

C. The Trial Court's Order Closing The Courtroom Did Not Protect Against The Perceived Harm.

Before closing any portion of a criminal trial, including *voir dire*, the trial court must demonstrate that closure will effectively protect the compelling interest at stake. *See Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2622; *United States* v. *Brooklier*, 685 F.2d at 1169. In this case, there has been no showing that closure will effectively protect the interests identified by the trial court. Even when the courtroom is closed, trial participants and court personnel may still describe the *voir dire* process to the press and public. *See Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2622. Such second-hand information may be either inadvertently or deliberately distorted. This Court has recognized that "given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts." *Nebraska Press Association* v. *Stuart*, 427 U.S. at 567.

The absence of any showing that closure will effectively serve its intended purpose is particularly acute with respect to the perceived interest in juror privacy. In this case, a portion of *voir dire* unrelated to the death penalty was conducted in public under the trial court's construction of *Hovey*. Presumably, questions concerning the political, religious and even sex-

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[44] *See* United States v. Barnes, 604 F.2d 121 (2d Cir.), *cert. denied*, 446 U.S. 907 (1979); Comment, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 Calif. L. Rev. 708 (1982); Comment, *Voir Dire Limitations as a Means of Protecting Jurors' Safety and Privacy*, 93 Harv. L. Rev. 782 (1980).

ual preferences of jurors, if permitted in the first instance by the trial court, would have been posed in this public proceeding.[45] *Voir dire* relating to imposition of the death penalty, according to the California Supreme Court, does not include inquiries calling for the disclosure of "private" information. *See Hovey* v. *Superior Court*, 28 Cal. 3d at 81 n.137, 616 P.2d 1354 n.137, 168 Cal. Rptr. at 181-82 n.137. Thus, it is difficult to perceive how juror privacy was enhanced by holding the "death-qualifying" portion of *voir dire* in secret.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision below be reversed.

Respectfully submitted,

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[45] *See* note 41 *supra*.

APPENDIX

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, non-profit organization of 28,000 members representing every branch and rank of print and broadcast journalism. Formed in 1909, it is the largest organization of journalists in the United States. Among the Society's purposes are its commitments to ensure that the public's business is conducted in public and to keep governmental proceedings, including court hearings, open to public inspection. Members of the Society regularly prepare news reports about the administration of justice, including reports about the jury selection process.

The American Newspaper Publishers Association is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of about 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

The American Society of Newspaper Editors ("ASNE") is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and "the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people."

The Associated Press is a membership non-profit corporation organized under the laws of the State of New York. It is a news wire service with the primary purpose of gathering, editing, and transmitting news reports and photographs to its 1,350 member newspapers and its 3,300 member broadcast stations throughout the United States, and to other publishers throughout the world.

The Associated Press Managing Editors Association is a membership non-profit corporation organized under the laws of the State of New York. Its members are the managing editors and other chief news executives of approximately 500 newspaper members of The Associated Press and The Canadian Press. Its principal purpose is the improvement of news writing and reporting and the content of the nation's daily newspapers and AP's news services.

The Los Angeles Times, a division of the Times Mirror Company, is a daily newspaper published in Los Angeles, California, with a daily circulation of 1,081,050 and a Sunday circulation of 1,340,743.

The Miami Herald Publishing Co., a division of Knight-Ridder Newspapers, Inc., publishes *The Miami Herald*, which has a daily circulation of 422,275.

The National Association of Broadcasters is a trade association consisting of over 5,200 radio and television stations and all the nationwide commercial broadcast networks. Among its primary concerns is maintaining the vitality of the First Amendment guarantee of freedom of the press.

The National Newspaper Association is a trade association consisting of more than 5,500 weekly and daily newspapers located throughout the United States. Since 1885, a major purpose of the Association has been to preserve the constitutional guarantee of freedom of the press.

The New York Times Company publishes *The New York Times*, which has a circulation of 929,000 on weekdays and 1,523,000 on Sundays, as well as thirty other newspapers. It owns three television stations, two radio stations and cable TV systems.

The Radio-Television News Directors Association ("RTNDA") is a non-profit professional organization of journalists. RTNDA includes approximately 2,000 members who are active at the network and local levels in the supervision, reporting and editing of news and public affairs programming on radio and television, both broadcast and cable.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment interests of the press. It has provided representation, information, legal guidance or research in virtually every major press freedoms case litigated since 1970.

The *San Francisco Chronicle*, a division of the Chronicle Publishing Co., is a daily newspaper published in San Francisco, California, with a daily circulation of 540,000 and a Sunday circulation of 705,625. The Chronicle Broadcasting Co., a wholly owned subsidiary of Chronicle Publishing Co., operates three television stations.

The Washington Post, a division of the Washington Post Co., publishes a daily newspaper of general circulation in the Washington, D.C. area (circulation approximately 750,000 weekdays, 950,000 Sundays), and maintains a substantial newsgathering organization.

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March 31, 1983

Reply Attention J.D. Ward

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Baker & Hostetler
818 Connecticut Ave., N.W.
Washington, D.C. 20006

Re: PRESS ENTERPRISE COMPANY v. THE
SUPERIOR COURT OF CALIFORNIA
RIVERSIDE COUNTY
Case No. 82-556

Dear Mr. Sanford:

Counsel for the Press Enterprise Company hereby consents to the filing of an amicus curiae brief on behalf of a number of national press organizations.

THOMPSON & COLEGATE

JAMES D. WARD
A Professional Corporation

JDW:la

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March 21, 1983

Mr. Bruce W. Sanford, Esquire
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Washington, D.C. 20006

Re: Press Enterprise Company vs. Superior Court of the State of California for the County of Riverside

Dear Mr. Sanford:

As counsel for the Respondents in the above-referenced case, we consent to your filing of a brief of Amicus Curiae in this matter on behalf of a number of national press organizations. We understand that you will file this brief not later than April 9, 1983, in compliance with the extension of time granted to the Petitioner.

Very truly yours,

GERALD J. GEERLINGS
County Counsel

Joyce Manulis Reikes

By: Joyce Manulis Reikes
Deputy County Counsel

JMR:gjs